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Supreme Court of the United States

October Term 1974

No. 74-314

FULTON LEWIS, III,

Petitioner,

v.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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September, 1974

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Supreme Court of the United States

October Term 1974

No.

FULTON LEWIS, III,

Petitioner,

—against—

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Fulton Lewis III ("petitioner") prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered herein.

Opinions Below

The opinion of the Special Term (QUINN, *J.*) is reported at 71 Misc. 2d 253 (Sup. Ct. N.Y. 1972), and appears in the appendix to this petition at page 19A.

The memorandum decision of the Appellate Division is reported at 41 A.D. 2d 707 (1973) (1st Dept. 1973), and appears in the appendix to this petition at page 18A.

The opinion of the Court of Appeals (STEVENS, *J.*) is reported at 34 N.Y. 2d 265 (1974); it appears in this petition at page 1A; the dissenting opinion of JASEN, *J.*, appears at page 13A.

Jurisdiction

The opinion of the Court of Appeals was entered on June 12, 1974. On August 12, 1974 Mr. Justice Marshall extended the time for the filing of this petition until Sep-

tember 28, 1974. (The extension had been sought so as to coordinate the filing of this petition with that in the related *Buckley* case, cf. *infra.*)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). 28 U.S.C. § 2403 may be applicable.

Questions Presented for Review

The questions presented for review are the same as those in the related case of *Buckley et al.* v. *American Federation of Television and Radio Artists* (hereinafter "the related *Buckley* case"). As it is intended that the petition in that case be filed immediately prior to the filing of the petition in this one, in the interests of brevity we do not repeat them here.

Relevant Constitutional and Statutory Provisions

The First Amendment, §§ 8(a)(3) and 9(a) of the National Labor Relations Act and the Fairness Doctrine (47 U.S.C. § 315) are also relevant here. As these provisions are quoted in the petition in the related *Buckley* case we do not print them in this petition.

Statement of the Case

Facts

At pages 1A - 3A of the opinion of the Court of Appeals and page 19A of the opinion of the Special Term, the courts below correctly set forth most of the relevant facts.

Additionally, it is undisputed that petitioner is a commentator on public affairs with a program broadcast by the Mutual Broadcasting System over 350 stations (A.5, 6, 56).

As such petitioner comes under § 57 of the Radio Code of Fair Practice by which employer-broadcasting companies

undertake to see to it, as a condition of employment, that their "performers" join the union.

King, Mutual's Vice-President of Programs and News Operations, testified without contradiction that it was the "policy and practice of Mutual" to respect this obligation (A.5, 9).

Petitioner was forced by the union to discontinue broadcasting during an eight-day strike (A.9-10).

Petitioner testified the fear of union discipline under Article 18 of the Union's Constitution (quoted at page 6b of the opinion of the United States Court of Appeals in the *Buckley* case) had caused him to censor his broadcasts on matters relating to labor relations (A.50-53).

Like the petitioners in *Buckley*, petitioner personally negotiates his own employment contracts. By so doing he has won for himself compensation at the rate of $700 a week (A.57). Under the Code of Fair Practice his compensation would be only $168 a week (A.168).

Petitioner has no pension benefits.

The union does not purport to be "exclusive representatives" in bargaining. In fact the compensation provided by the Code only purports to be a "minimum" (A.64), thereby affirmatively inviting individual negotiations.

Thus, although claiming the rights of a union under § 8(a)(3), the union does not provide the consideration contemplated by § 9(a) and the free rider cases, i.e. negotiation of the terms of "pay, wages, hours of employment" for members of the collective bargaining unit as their "exclusive representatives."

The Complaint

The complaint, alleging these facts and that, as applied to him, § 8(a)(3), in so far as authorizing the union and the employer-broadcasting companies and the union to require him to be a member of the union, pay dues and obey its orders, as a condition of comment on public affairs was unconstitutional, and that § 57 of the Code was, as to him, illegal and unconstitutional and sought a declaratory judgment that, as to him, § 57 was void and of no effect.

Jurisdiction. As this suit was brought in a state court of general jurisdiction, it was, of course, unnecessary to set forth facts which would bring the case within any statute defining a limited jurisdiction.

The Decision of the Special Term

The Special Term first overruled the union's preliminary objections to jurisdiction, declaratory judgment, etc. (20A-22A).

The Special Term, on the merits, dismissed the compalint. It found that § 8(a)(3) was a valid exercise of power under the Commerce Clause, and that " 'membership' need be no more than paying dues" citing *National Labor Relations Board* v. *General Motors*, 371 U.S. 734, 741 (23A-24A).

The Decision of the Appellate Division

The Appellate Division modified the judgment of the Special Term to the extent of substituting, for that part of the judgment dismissing the complaint, a judgment declaring that § 8(a)(3) did not violate the First Amendment (18A). The Court wrote no opinion.

The Decision of the Court of Appeals

The opinion of the Court of Appeals stated more elaborately the same reasoning as that of Special Term, viz., that the NLRA was a valid exercise of power under the Commerce Clause (4A-5A).

Whatever effect the strike may have had upon petitioner's speech, the law recognizes a right to picket, the Court noted. (6A-7A).

As for dues "the fact that plaintiff may elect to bargain for himself does not relieve AFTRA of its obligation, if requested to do so." (8A). "So long as plaintiff remains a member of AFTRA he is bound to pay dues or their equivalent by reason of the agreement, the union's constitution or its by-laws." (11A).

The Court found benefit for petitioner in the union's activities in that, "The salaries of others provide a standard by which the value of plaintiff's services can be measured." (12A).

The Court made no specific ruling with respect to petitioner's prayer that § 57 of the Code, in so far as requiring him to be a union member, be declared void and of no effect. The Court did say, however, that a union member might resign at any time, subject to the union's rules in that respect (10A-11A). The Court further noted that when petitioner "lawfuly severs his ties, he will be free of AFTRA's control." 11A. The Court continued: "Jurisdiction to determine an unfair labor practice, if plaintiff believes that is what is involved here, lies with the NLRB and not with this Court." The Court here cited the decision of the United States Court of Appeals in the related *Buckley* case, that decision having been announced a short time earlier. 11A.

The Dissenting Opinion of Jasen, *J.: A commentator on public affairs "whose First Amendment rights are of peculiar importance is so specially situated as to have standing to claim freedom from interference with his right to freely comment on public affairs."**

The dissenting opinion held that § 8(a)(3), "insofar as it authorizes a commentator on public affairs to be required to join a labor organization and comply with its orders, as a condition of speaking over radio, violates the First Amendment." (13A).

Considering *Radio Officers Union* v. *National Labor Relations Board*, 347 U.S. 17 (1947), *National Labor Relations Board* v. *General Motors*, 393 U.S. 734 (1963), *National Labor Relations Board* v. *Textile Workers*, 409 U.S. 213 (1972), and *Booster Lodge No. 405* v. *National Labor Relations Board*, 412 U.S. 84 (1973), the dissenting judges concluded that, whatever AFTRA may argue in this particular case, petitioner was required to be a member of the union and, as such, subject to its disciplinary sanctions (16A).

This result the dissenting judges found inconsistent with petitioner's rights under the First Amendment (16A). The dissenting judges said (16A):

> "The very essence of plaintiff's trade is the public discussion of matters of public interest or concern, an activity which has long held to be preeminent among the various First Amendment rights (citations). Such a commentator, whose First Amendment rights are of peculiar importance, is so specially situated as to have standing to claim freedom from interference with his right to freely comment on the news and public affairs."

* In which GABRIELLI, *J.* concurred.

Reasons for Granting the Writ

1. In conflict with applicable decisions of this Court, the New York Court of Appeals has upheld a law authorizing prior restraint of speech despite the absence of "clear support in public danger, actual or impending."*

We adopt the presentation in support of this proposition made in the petition in the related *Buckley* case, with this added comment:

The New York Court of Appeals seems more unaware, we submit, than the United States Court of Appeals that such considerations as "industrial peace and stability in labor relations" and "the flow of interstate commerce" do not control, as we see it, when legislation is challenged under the First Amendment as distinguished from the Fifth and Fourteenth Amendment due process clauses.

The Court reached this result although, (1) the union does not function as "exclusive representatives," (2) petitioner's "pay, wages, hours of employment" are governed by contracts negotiated by him, and (3) union membership has been, for petitioner, a nuisance, not a benefit.

We adopt the presentation made in the *Buckley* case in so far as the legal analysis is concerned, but not of course so much as relates to facts peculiar to Buckley and Evans. As regards this petitioner the allegations of the preceding paragraph apply as shown *supra* page 2. We additionally comment:

There being no evidence in the record that petitioner is enrolled in the pension plan or otherwise entitled to pen-

* *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

sion benefits (and he is not, in fact), the only benefit that the Court found as a result of the union's efforts was, as we have said, that "the salaries of others provide a standard by which the value of his services can be measured." *Supra* page 5. That the union negotiated for him a salary of $168 was hardly a help to petitioner in negotiating for himself a salary of $700. In fact it made petitioner's negotiations more difficult. Surely so nebulous a benefit (assuming that any in fact exists) is not a sufficient ground for denying petitioner what would otherwise be his constitutional rights.

2. In conflict with applicable decisions of this Court, the New York Court of Appeals has held that, by reason of the doctrine of pre-emption, the state courts of New York were without jurisdiction to declare that § 57 of the Code of Fair Practice (radio) was, in so far as requiring petitioner to be a member in good standing of the respondent union as a condition of comment on public affairs, "void and of no effect."

Whatever may be said as to dues, it has been abundantly settled since *Radio Officers Union* v. *National Labor Relations Board*, 347 U.S. 17 (1947), by a long series of cases in this Court and the Courts of Appeals, that a union may not compel membership. Cf. page 13 of petition in the related *Buckley* case.

The declaratory judgment procedure of the State of New York permits a declaratory judgment of petitioner's rights in this respect, as demonstrated by the dissenting opinion. 17A. The opinion of the Court did not dispute this proposition.

The Court indicated by its remark at page 11A that its failure to grant such a judgment was based upon the United States Court of Appeals decision in the related *Buckley* case holding that the doctrine of pre-emption applied under the circumstances.

The ruling of the New York Court of Appeals, being based upon that of the United States Court of Appeals is subject to the other comments made in the petition in the related *Buckley* case respecting pre-emption. For the reasons there stated the application of that doctrine here was in conflict with applicable decisions of this Court.

It is also to be noted that because the trial court here was a court of general jurisdiction, there can be no doubt that, apart from pre-emption, the court had jurisdiction.

CONCLUSION

The Court should grant a writ of certiorari to review the decision of the New York Court of Appeals herein.

Respectfully submitted,

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September, 1974

STATE OF NEW YORK
COURT OF APPEALS

FULTON LEWIS, III,

Appellant,

vs.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS,

Respondent.

Opinion of Court of Appeals

STEVENS, *J.*:

Plaintiff, a radio commentator on public affairs, states that he was required by his employer, Mutual Broadcasting System, Inc. (Mutual) to join defendant American Federation of Television and Radio Artists (AFTRA), pay dues, and comply with AFTRA's orders or directives as a condition of employment. Plaintiff asserts such requirement is purportedly authorized by Section 8(a) (3) of the National Labor Relations Act (NLRA, 29 U.S.C. Sec. 158(a) (3)). He seeks a declaratory judgment that such requirement, as a condition of speaking over radio, violates his rights under the First Amendment of the Constitution of the United States.

AFTRA admits that it has a union shop contract with Mutual as exclusive bargaining agent for employees of Mutual in appropriate bargaining units and as exclusive bargaining representative for those employees in various other categories (one of which includes plaintiff, *viz.* broad-

casters); that it "is the designated selected or certified bargaining representative pursuant to the provisions of Section 9(a) of NLRA, 29 U.S.C. Sec. 158; admits that AFTRA is empowered to enter into agreements with employers requiring as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, pursuant to the provisions of Section 8(a) (3) of NLRA, 29 U.S.C. Sec.158;".

After joinder of issue plaintiff moved for summary judgment and such motion was denied. AFTRA's cross-motion for summary judgment was granted and the complaint dismissed. The Appellate Division modified to strike the dismissal and to substitute therefore a provision declaring that Sec. 8(a) (3), insofar as it authorizes AFTRA to require plaintiff to pay dues as a condition to speaking on radio, does not violate the First Amendment. As so modified the order was otherwise affirmed.

Under AFTRA's Code of Fair Practice, and its agreements with Mutual, Mutual bound itself to "employ and maintain in our employment only such persons covered by this agreement as are members of the American Federation of Television and Radio Artists in good standing...." Such a provision is expressly permitted by the language of Sec. 8(a) (3), NLRA, 29 U.S.C. Sec. 158, entitled "Unfair labor practices". That section provides, in pertinent part,

> "(a) It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire

> or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 159(a) of this title, . . . ;".

It is undisputed that AFTRA is the designated, exclusive representative in accordance with Section 9(a) NLRA, 29 U.S.C. Sec. 159.

Plaintiff is and since 1966 has been a dues paying member of AFTRA and is under contract to Mutual. Plaintiff argues that since Section 8(a)(3) authorizes the union shop or union security provision heretofore quoted, it violates the First Amendment, particularly the provision that "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." While plaintiff's contract with Mutual is a separate agreement, Mutual, respecting its obligations under the Code of Fair Practice, requires by such contract that plaintiff be a member of AFTRA. Plaintiff asserts that AFTRA requires that he remain a member in order to continue broadcasting with Mutual, that in 1967 he was required to interrupt his broadcasting by reason of a strike, and that he has felt intimidated by reason of AFTRA's disciplinary powers.

The question is do the provisions of Section 8(a)(3), by requiring plaintiff to pay AFTRA dues, unconstitutionally

act as a prior restraint on plaintiff's right of free speech? In our view it does not.

Article I, Section 8(3) of the United States Constitution provides "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States and with the Indian tribes;". The regulation of commerce involves not only traffic but commercial intercourse, and the power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed" (*Gibbons* v. *Ogden*, 9 Wheat 1, 196). This power, including the power to restrain or prohibit and to prescribe rules by which commerce is governed for the general welfare, is complete in itself so long as the specific limitations imposed, by the due process clause of the Fifth Amendment, are not violated (*United States* v. *Carolene Products Co.*, 304 U.S. 144). This power is also a protective power which enables Congress to adopt measures to foster, protect and control commerce, as well as to adopt measures to insure its safety. Acts which impede or burden the free flow of interstate commerce, including acts which grow out of labor disputes are within this protective power.

With the growth and development of this nation and its commerce it became obvious that industrial peace and stability in labor relations was essential. If such was ever to be achieved, there had to be some governmental guarantees of labor's right to organize and bargain collectively through representatives of their own choosing. Continuing labor disputes, resulting in part in inequalities in the strength of bargaining power, led to abuses, favored contracts and even violence. Naturally, the flow of interstate commerce was seriously affected.

Section 7(a) of the ill-fated National Industrial Recovery Act of 1933 (NIRA) had produced certain real benefits

and encouraged labor to press forward. When the NIRA was held unconstitutional on May 27, 1935, it was succeeded, on July 5, 1935, by the National Labor Relations Act (NLRA). This act sought to promote industrial peace by encouraging organization and collective bargaining through representatives of labor's own choosing (NLRA Sec. 7, 29 U.S.C. Sec. 157). Majority representation was established as a desirable principle (NLRA Sec. 9, 29 U.S.C. Sec 159). The necessary result was some equalization of bargaining strength between labor unions and employers. As a safeguard against abuses by either, certain acts or conduct were defined as unfair labor practices (NLRA Sec. 8, 29 U.S.C. Sec. 158). NLRA specifically forbids "any unfair labor practice affecting commerce." Its constitutionality has been upheld as a valid exercise of Congressional power in a case which dealt with manufactured products, (*National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1), and later, one involving farm produce, *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U.S. 453).

In the *Jones & Laughlin* case, *supra.*, p. 33, the Supreme Court spoke of the right of employees to self-organization and to representation of their own choosing, for "collective bargaining or other mutual protection without restraint or coercion by their employer", as a fundamental right on a par with the right of an employer "to organize its business and select its own officers and agents."

It is clear that AFTRA and Mutual acted within the scope of the law.

Plaintiff has a right to be protected in the exercise of his freedom of speech. However, plaintiff's contention that his right to free speech is affected is totally without merit. The power of Congress to regulate commerce is contained

in Article 1 of the Constitution. The guarantee of freedom of speech appears in the Constitution in the First Amendment, which expressly forbids Congress to make any law abridging the freedom of speech. This prohibition similarly affects the States by virtue of the due process clause of the Fourteenth Amendment. (See N.Y. Const. Art. 1, § 8)

"The cardinal principle of statutory construction is to save and not to destroy . . . as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." (*National Labor Relations Board* v. *Jones and Laughlin Steel Corp., supra.*, p. 30).

Freedom of speech in its essence involves no previous restraint upon utterance or publication. It does not confer immunity, for abuse of the right will subject the offender to legal punishment. (See, *De Jonge* v. *Oregon*, 299 U.S. 353, 364). The tests for abuse have been referred to as "clear and present danger" (*Schenck* v. *United States*, 249 U.S. 47; see also *Stromberg* v. *California*, 283 U.S. 359), or the common law test of dangerous tendency, *Gitlow* v. *New York*, 268 U.S. 652 (Holmes and Brandeis, JJ. dissenting). The prevailing view at present is the "clear and present danger" test (*Terminiello* v. *Chicago*, 337 U.S. 1; *Thornhill* v. *Alabama*, 310 U.S. 88).

We look now to the record of what actually occurred with respect to plaintiff. In 1967, when a strike occurred he was requested to refrain from broadcasting. He did so. Apparently there was a picket line maintained by the union. The right to picket peacefully for a legal purpose as a means of communication and persuasion in labor disputes has been recognized and upheld as being valid (*Thornhill* v. *Alabama*, 310 U.S. 88; *Varlson* v. *California*, 310 U.S. 106).

However, even peaceful picketing "cannot dogmatically be equated with the constitutionally protected freedom of speech" (*International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470, 474). The character, quality and circumstances of the act frequently determine its legality. "The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatans' ". (*Teamsters Union* v. *Hanke supra.*, p. 474). The request to refrain from broadcasting and, in effort, to respect the picket line, was not a request to do an illegal act, but a request to a member to aid in strengthening the union. He could have refused, as the record indicates others did, without retaliation. Admittedly, future strikes might result differently. The request to do a legal act would not wipe out the obligation to pay dues or to tender an equivalent sum.

There is nothing in the record which suggests, even remotely, that AFTRA attempts to censor plaintiff's broadcasts or that plaintiff is not free to express his views fully and freely, nor even that he is, or has been, punished or disciplined for the expression of such views. The contention of prior restraint must fall for it does not appear that plaintiff's fundamental right of free speech or liberty has been infringed.

There remains then the question of whether the requirement that plaintiff pay dues or tender an equivalent sum, in order to broadcast over Mutual, violates plaintiff's right of free speech or personal liberty. The statute permits a union security shop. Aside from that we look to determine if such a requirement is reasonable in rational experience.

Laws are made not for the individual but for the benefit and protection of the whole body. The rights of employees

were only secured through organization and protected by legislation and organization. Each employee must bear a fair share of the financial burden of union representation, with the union's obligation under the NLRA being to represent all employees of the class or craft it represents, regardless of union affiliation. (*International Association of Machinists* v. *Street*, 367 U.S. 740, 761-764).

"It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed" (*Steele* v. *Louisville & Northern Railroad Co.*, 323 U.S. 192, 202). The union has the obligation to act without hostile discrimination. "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seriority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit" (*Steele* v. *Louisville & Northern Railroad Co.*, *supra.*, p. 203).

The fact that plaintiff may elect to bargain for himself does not relieve AFTRA of its obligation, if requested to do so. If plaintiff be exempted from payment of dues no good reasons exists why other members, perhaps not so well known, should not also be granted exemption. In time this would mean the end of union organization and the

return to a species of jungle warfare which inevitably would impede and obstruct interstate commerce.

However, in *Machinists & Aerospace Workers* v. *NLRB*, 412 U.S. 84 (1973), the Supreme Court affirmed a judgment of the Court of Appeals (D.C. Cir.) sustaining the Board's finding of an unfair labor practice on the part of the union. In that case the action had a collective bargaining agreement with the Boeing Company. The day after expiration of the agreement, the union called a strike which lasted 18 days, and picketed one of Boeing's plants. One hundred forty-three union members crossed the picket line to work, 61 of whom resigned their membership prior to returning to work and 58 thereafter. All were fined by the union. There was no evidence that the union members either knew or had consented to any limitation on their right to resign. In fact, neither the constitution nor the by-laws of the union contained any provision expressly permitting or forbidding resignations. The Board ordered the union to cease and desist from seeking court enforcement of the fines as an unfair labor practice and the union appealed.

The Court left open "the question of the extent to which contractual restriction on a member's right to resign may be limited by the [National Labor Relations] Act." It applied the law "which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated." (*Id.*, p. 88; see also, *NLRB* v. *Textile Workers*, 409 U.S. 213, 217).

In the instant case, there are agreements extant. Presumably, the members of AFTRA are aware of their rights and obligations thereunder. The dues and fees require-

ment of the agreement does not represent governmental action, but a contractual obligation. Resort by the union to the NLRB or to state or federal courts for enforcement of the requirement could conceivably involve governmental action (cf. *Driscoll* v. *International Union of Operating Engineers Local 139*, 484 F.2d 682 (7th Cir., 1973).

In *Hammond* v. *United Papermakers and Paperworkers Union*, 462 F.2d 174 (6th Cir., 1972), plaintiff, a Seventh Day Adventist, refused to join the union or pay the equivalent of dues and was discharged from his employment by reason of the union shop agreement. The court affirmed summary judgment dismissing the complaint, noting that Congress has authorized union shop clauses "as permissible, contractual provisions in a collective bargaining agreement between a union and management." (*Id.*, p. 175; see also *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir., 1971), *cert. den.* 404 U.S. 872).

The language used in *NLRB* v *Textile Workers, supra.*, where neither the union-management agreement nor the union's constitution or by-laws defined or limited the circumstances under which a member could resign, is significant. The finding by the NLRB of an unfair labor practice on the part of the union in coercing the employees, by the imposition of fines, in its exercise of rights guaranteed in section 7 of the NLRA, was affirmed. The Court said, "when a member lawfully resigns from the union, its power over him ends. . . . Under § 7 of the Act the employees have 'the right to refrain from any or all' concerted activities relating to collective bargaining or mutual aid and protection, as well as the right to join a union and participate in those concerted activities." (*Id.* pp. 215-216). The associational rights of individuals are protected under § 7 and restraint or coercion prohibited under § 8. How-

ever, § 8 does not impair "the right of a labor organization to prescribe its own rules with respect to acquisition or retention of membership therein." (29 U.S.C. § 158 (b)).

Where a collective bargaining agreement contains a union shop clause, which defines or limits the conditions under which a union member may resign, until the member takes action in accordance with such procedure, he is bound to pay dues or their equivalent. In the absence of an unwarranted abridgment of constitutional rights in a particular case, reasonable regulations should be favored. reasonable fees, reasonably adjusted to the needs and the circumstances should be approved. Every tax or every fee or even dues charged, will not, of necessity, constitute interference with a constitutional right (See, *Matter of Steinbeck* v. *Gerosa*, 4 NY 2d 302). So long as plaintiff remains a member of AFTRA he is bound to pay dues or their equivalent by reason of the agreement, the union's constitution or its by-laws. If and when he lawfully severs his ties, he will be free of AFTRA's control. Jurisdiction to determine an unfair labor practice, if plaintiff believes that is what is involved here, lies with the NLRB and not with this Court.*

Whether or not one be classified as a "member" is hardly determinative so long as union obligations are met. In the absence of a specific provision in the union constitution or by-laws, a union member may submit a voluntary resignation at any time (*NLRB* v. *Mechanical & Allied Production Workers, Local 444*, 427 F.2d 883 (1st Cir., 1970); *Communication Workers* v. *NLRB*, 215 F.2d 835, 838-839 (2nd Cir., 1954).

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* See *Evans* v. *American Federation of Television and Radio Artists*, ...F.2d ....., 42 LW 2597, [decision of U.S. Court of Appeals, Second Circuit, on April 29, 1974, reversing *Evans* v. *AFTRA*, 354 F. Supp. 823].

It has been held that a union can enforce, in a state court, a fine levied against a strikebreaking member where the union's constitution or by-laws contain a provision defining or limiting the circumstances under which a member could resign (*NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967)). Such action neither violates §7 nor constitutes an unfair labor practice under §8(b) of the NLRA.

Nor is it unreasonable to require payment. "Union activity is by its very nature group activity, and is grounded on the notion that strength can be garnered from unity, solidarity and mutual commitment", *NLRB* v. *Textile Workers, supra.*, at p. 221, (dissenting opinion of Blackmun, J.). We pay tolls on highways, the licensee of a radio or television station undoubtedly pays a fee for the privilege, as does the sponsor of or advertiser on a program aired on television or radio. AFTRA's services entail expenses. Since such services are for the benefit of all it represents, all should share in the cost. The salaries of others provide a standard by which the value of plaintiff's services can be measured. Without them, and without organization, plaintiff as a single individual might well be powerless to command the salary presently received.

Freedom of speech and freedom of the press are fundamental rights. Denial of the right violates basic principles of liberty and justice and is not to be tolerated in a free society. The mere allegation of such denial does not establish the fact, and that is the weakness of plaintiff's position. I would agree with Judge Brieant "It is not necessary to declare Section 8(a)(3) unconstitutional on its face in order to effectuate plaintiff's rights" (*Evans* v. *American Federation of Television and Radio Artists*, 354 F. Supp. 823, 847, (U.S.D.C., S.D.N.Y., 1973)).*

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* Reversed by U.S. Court of Appeals, Second Circuit on April 29, 1974 (.... F.2d ....), See 42 LW 2597.

The conclusion here reached, however, is that the requirement for payment of dues, and the union shop provision are not shown on this record to violate plaintiff's rights, nor does such payment amount to a tax upon his right of free speech, authorized by government by reason of Section 8(a) (3). The dues and union shop requirement do not become government action by reason of a protected right under federal law to organize and bargain collectively. (See *Driscoll* v. *International Union of Operation Engineers, Local 139, supra.*).

The rights and obligations under NLRA meet a social and economic need and such rights and duties are within the power of Congress to guarantee. The union shop provision in AFTRA's contract with Mutual might bar access of Mutual's channels to plaintiff if he ceased to pay dues or their equivalent to AFTRA. It would not limit his right to freely express his views, or to utilize other channels or avenues not so bound by agreement. Section 8(a) (3) also bars an employer from discriminating against a non-member of a union under stated conditions not here relevant.

Accordingly, the order of the Appellate Division should be affirmed with costs.

JASEN, *J.* (dissenting):

I concur in so much of the court's opinion which holds that plaintiff, a radio commentator on public affairs, may be compelled to pay dues to AFTRA as a condition of his employment. However, I would hold that section 8(a) (3) of the National Labor Relations Act, insofar as it authorizes a commentator on public affairs to be required to join a labor organization and comply with its orders, as a condition of speaking over radio, violates the First Amendment.

The term "membership in a labor organization" in section 8(a) (3) has been interpreted narrowly to provide that

any person is a member of a union and thus satisfies the condition of employment under a union shop agreement if that person tenders the customary initiation fees and dues to the labor organization. (*Radio Officers* v. *Labor Board*, 347 U. S. 17; *NLRB* v. *General Motors*, 373 U. S. 734.) "'Membership' *as a condition of employment* is whittled down to its financial core." (*NLRB* v. *General Motors*, *supra*, at p. 742 [emphasis supplied].)

However, that is not to say that "membership" as a condition of employment is identical with "membership" as a description of the relationship between the labor organization and the employee. For example, in *NLRB* v. *General Motors* (*supra*), the United States Supreme Court discussed the difference between an agency shop and a union shop. The agency shop arises from a union security agreement between an employer and a union whereby "all employees are required as a condition of employment to pay dues to the union and pay the union's initiation fee, but they need not actually become union members." (*Id.*, at p. 736.) On the other hand, under a union shop agreement, "if the union chooses to extend membership even though the employee will meet only the minimum financial burden, and refuses to support or 'join' the union in any affirmative way, the employee may have to become a 'member' under a union shop contract, in the sense that the union may be able to place him on its rolls. The agency shop arrangement * * * removes that choice from the union and places the option of membership in the employee * * * *" (*Id.*, at p. 744.) Thus, where there is a union shop agreement, as here, the labor organization and not the employee has the "option of membership."

This being so, it is relevant to inquire whether there is a constitutional infirmity in section 8(a)(3) as applied to persons, such as commentators on public affairs, whose

First Amendment protection is of marked importance. Plaintiff contends that the element of union discipline as set forth in Article XVIII of the AFTRA Constitution[1] constitutes an unlawful and unreasonable prior restraint of his right to broadcast his commentary and analysis of the news. He argues that this provision authorizes the labor organization to discipline him for any "act, omission or conduct * * * prejudicial to the welfare of the Association." The chilling effect of this provision should be readily apparent. As a member of the labor organization, plaintiff is obligated to observe the orders issued by the organization. For example, in event of a strike, he would be ordered to refrain from crossing the picket line and thereby prevented from speaking on the radio as a commentator on public affairs. If he then chose to cross the picket line and violate his obligations as a union member, his conduct would undoubtedly be considered "prejudicial to the welfare of the Association", thereby subjecting him to disciplinary sanctions, including a fine.[2]

AFTRA argues that there is no real danger inherent in the power of the union to fine plaintiff for violating a strike order since the United States Supreme Court has held that

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1. "SECTION 1. Any member who shall be guilty of an act, omission, or conduct which in the opinion of the Board is prejudicial to the welfare of the Association, or of any of its Locals, or of any of its members, as such, or any member who shall fail to observe any of the requirements of the Constitution, or of any By-Laws, rules, regulations or orders lawfully issued by the Association, any Local or any duly authorized committee or agent of said Association or Local, or any member who shall in any way be indebted to the Association or any Local thereof, may, in the discretion of the Board, be either fined, censured, suspended or expelled from membership."

2. AFTRA concedes in its brief that "[a]n AFTRA member might * * * be subject to discipline enforced by fines * * * for such acts or omissions as crossing picket lines or failing to take part in a strike."

a union member may avoid such fines by resigning from the union before returning to work. (*Booster Lodge No. 405, Machinists & Aerospace Workers* v. *NLRB*, 412 U. S. 84; *NLRB* v. *Textile Workers*, 409 U. S. 213.) In both of these decisions, it should be observed, the court was careful to point out that there were no restrictions on the union members' right to resign from the union. (*Booster Lodge No. 405, Machinists & Aerospace Workers* v. *NLRB, supra*, at p. 88; *NLRB* v. *Textile Workers, supra*, at p. 216.) Indeed, the court implied that such a right to resign does not exist under a union shop agreement. (*NLRB* v. *Textile Workers, supra*, at p. 216, n. 4; at p. 219, n. 3; see also, *NLRB* v. *Mechanical & Allied Production Workers, Local 444*, 427 F 2d 883; *Communications Workers* v. *NLRB*, 215 F 2d 835, 838-839.) Hence, plaintiff, broadcasting under a union shop agreement, is required to be a member of AFTRA, and, as such, is subject to all of the disciplinary sanctions to which members may be subjected.

In my view, the relationship between plaintiff, as a commentator on public affairs, and defendant, as a labor organization, imposed upon plaintiff under authority of section 8(a)(3) of the National Labor Relations Act, is constitutionally infirm. The very essence of plaintiff's trade is the public discussion of matters of public interest or concern, an activity which has long been held to be preeminent among the various First Amendment rights. (*Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 43-44; *Garrison* v. *Louisiana*, 379 U. S. 64, 74; *Thornhill* v. *Alabama*, 310 U. S. 88, 101-102.) Such a commentator, whose First Amendment rights are of peculiar importance, is so specially situated as to have standing to claim freedom from interference with his right to freely comment on the news and public affairs. The threat of disciplinary sanctions, as stated before, constitutes an unlawful and unreasonable

prior restraint of his right to broadcast his commentary and analysis of the news.

Nor may defendant successfully argue that the present action is not "ripe" for a declaratory judgment. Plaintiff has once refrained from broadcasting because of an AFTRA strike in 1967. The threat to plaintiff's First Amendment rights is as close as the next union-industry dispute. In a situation such as this, where there is an uncertain and disputed jural relationship, a declaratory judgment has the practical effect of quieting or stabilizing that relationship and is particularly appropriate. (See *James* v. *Alderton Dock Yard*, 256 N. Y. 298; *Somberg* v. *Somberg*, 263 N. Y. 1.) Plaintiff need not defy the union's demands and suffer the consequences in order to obtain an adjudication of his rights. It is the purpose of a declaratory judgment to obtain a determination of a controversy before obligations are repudiated and rights invaded. (*Post* v. *Metropolitan Cas. Ins. Co.*, 227 App. Div. 156, affd. 254 N. Y. 541.) If plaintiff were to wait until he suffered actual interference with his right to free speech, any court proceeding could only result in prospective relief and would be too late to remedy the immediate harm he would suffer. In short, a declaratory judgment should be available where resort to ordinary actions would not afford adequate relief. (*Gaynor* v. *Rockefeller*, 15, N Y 2d 120, 132.)

Accordingly, I would declare that section 8(a)(3) of the National Labor Relations Law is constitutionally infirm, insofar as it authorizes a prior restraint upon a person such as the plaintiff, a commentator on public affairs.

* * *

Order affirmed, with costs. Opinion by Stevens, J. All concur except Jasen, J., who dissents in part and votes to modify in an opinion in which Gabrielli, J., concurs.

Memorandum Decision of Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FULTON LEWIS, III,

Plaintiff-Appellant,

—against—

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS,

Defendant-Respondent.

C. D. WILLIAMS
E. SCHLESINGER

ORDER, Supreme Court, New York County (Quinn, *J.*), entered on September 8, 1972, denying motion of plaintiff for summary judgment and granting cross-motion of defendant for summary judgment, unanimously modified, on the law, to the extent of striking therefrom so much of that paragraph which dismisses the complaint and by substituting therefor a provision declaring that § 8(a)(3) of the National Labor Relations Act, insofar as it authorizes defendant to require plaintiff to pay dues as a condition of speaking on radio, does not violate the First Amendment. As so modified, the order is affirmed, without costs and without disbursements.

We are not unaware of the succinct opinion of Brieant, *J.*, in Evans, Buckley v. American Federation of Television and Radio Artists, U.S. District Court, Southern District of New York, January 23, 1973.

Order filed.

Opinion of Special Term (Quinn, J.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FULTON LEWIS, III,

Plaintiff,

v.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS,

Defendant.

This is a motion by plaintiff for summary judgment. Defendant cross-moves for summary judgment in its favor.

Plaintiff's motion for summary judgment, pursuant to CPLR 3212, seeks a judgment (1) declaring a: that plaintiff may continue to appear on radio irrespective of membership in the defendant American Federation of Television and Radio Artists ("AFTRA"), b: that section 8(a)(3) of the National Labor Relations Act, insofar as it authorizes or purports to authorize AFTRA's agreement with radio broadcasters which requires or purports to require that plaintiff be a member of AFTRA, pay dues, or comply with AFTRA's orders and regulations violates the First and Ninth Amendments to the United States Constitution; and (2) enjoining AFTRA from taking or threatening any action against plaintiff by reason of his withdrawal from AFTRA, failure to pay AFTRA's dues or comply with any AFTRA order.

Defendant's cross motion for summary judgment seeks to dismiss the complaint on the grounds that (a) the complaint fails to place a present justiciable controversy before the court, (b) because the complaint fails to state a cause of action or claim upon which relief can be granted, and (c) that the court has no jurisdiction over the subject matter of the cause of action.

Opinion of Special Term (Quinn, J.)

Plaintiff is a news commentator and has his own radio shows over the Mutual Broadcasting System. Defendant has entered into an agreement with Mutual by which membership in AFTRA is required as a condition of employment by Mutual for broadcasting purposes. Under this agreement Mutual can maintain in employment only those persons who are members of the Union in good standing, or making application for membership within 30 days of employment and thereafter maintain membership in good standing as a condition of employment. It is the policy and practice of Mutual to comply with its "union shop" obligations to AFTRA. Thus, plaintiff has joined AFTRA.

Plaintiff alleges that he has been coerced by AFTRA to stay in the union at the risk of losing his employment. He also alleges that he had been intimidated by AFTRA into stopping broadcasting during an AFTRA strike in 1967. He alleges that he feared that if he did not "play ball" with the union he would be open to disciplinary action by the union and thus possibly lose his membership in the union and therefore his job. Plaintiff also alleges that fear of possible disciplinary action by the union has made him feel a certain intimidation as to expressing on the air certain of his views that are contrary to the interests of the union. In general, plaintiff contends the requirement of membership in the union violates his right of freedom of speech and is thus unconstitutional. Defendant disputes the factual allegations of any coercion or intimidation on its part.

The first question that must be dealt with is whether the court has jurisdiction to entertain this case.

> "The Supreme Court is a court of general jurisdiction, and it is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed." (N.Y. Const., Art. VI)

Here, the complaint asserts that § 8(a) (3) of the National Labor Relations Act, under the authority of which defendant has negotiated a contract with Mutual Broadcasting System, giving it the right to prevent plaintiff from appearing on Mutual's network unless he is a member of defendant union violates, to that extent the First Amendment to the U.S. Constitution. Thus, there is a clear claim under the U.S. Constitution, and there is no doubt that state courts of general jurisdiction may entertain such claims.

The fact that plaintiff is continuing to pay his dues rather than possibly be put off the air does not mean that there is not a justiciable controversy for this court to hear. "An action for a declaratory judgment is the appropriate determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights and wishes to avoid the hazard of taking action in advance of the determination of such rights. Bunis v. Conway, 17 A D 2d 207, 208. The remedy of an action for declaratory judgment is particularly appropriate for the determination of constitutional questions." (Bunis v. Conway, supra, 210.) If the remedy of declaratory judgement were not available, the constitutionality of the union shop would never be adjudicated as no public commentator would be willing to be put off the air for the period of time necessary to litigate the issue.

The arguments that the court lacks jurisdiction on theories of preemption or failure to exhaust remedies are without merit. This is not a case which is preempted by a federal board. The policy behind the preemption doctrine is not served by deferring to the Board where a constitutional question is validly presented. The Board's special expertise does not extend to the interpretation of

the Constitution. The field has been traditionally reserved to the courts. In addition, the plaintiff is clearly not bringing an action under the Federal Communications Act of 1934. Further, this is not a grievance against an employer under a collective bargaining agreement that he must first process under the procedures in the collective bargaining agreement. This rather, is a case asserting rights under the First Amendment in which the court has a clear right to take jurisdiction.

On the merits of the case there are two main issues to be decided. The first is whether the proviso of NLRB, section 8(a)(3) by requiring plaintiff to be a member of AFTRA and pay dues unconstitutionally acts as a prior restraint on free speech. The second question is whether the factual disputes as to coercion or intimidation by AFTRA are relevant to the above legal question, thus rendering summary judgment impossible.

It is clear that newscasters as well as all radio and T.V. performers are entitled to the protection of the First Amendment. Freedom of speech including expression not limited to the written or spoken word. However, it is clear that freedom of speech is not absolute. Near v. Minnesota, 283 U.S. 697 (1931); Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

The state has the power to regulate, despite what may be some incidental infringement, individual rights. The helpful means devised by the state to deal with "evils" has been weighed by the courts against any infringement on rights. Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967). Congress has exercised its constitutional power to regulate labor relations, enacting the Wagner Act of 1936, the Taft-Hartley Act of 1947, and the Landrum-

Griffin Act of 1959. Under the National Labor Relations Act (NLRA), Congress empowered the National Labor Relations Board to regulate labor relations. NLRA commands, as its purpose and policy, that the peaceful procedures of collective bargaining supersede the jungle warfare which caused industrial strife. Thus collective bargaining is a private undertaking by employer and labor organizations in the public interest. The case of National Labor Relations Board v. Jones & Laughlin, 301 U.S. 1 (1937), affirmed the validity of the Wagner Act, and this has been the basis of all future labor regulations. The only source of revenue for the union is membership dues and initiation fees. The Supreme Court has made it clear that requiring a reasonable fee for membership by a "union shop" provision is not in itself a violation of constitutional rights. Railway Employees Department v. Hanson, 351 U.S. 225 (1956); Machinists v. Street, 367 U.S. 740 (1961). The viability of unions is part and parcel of Congress's intention to promote industrial peace through collective bargaining. The beneficiaries of collective bargaining, being all the members of the laboring force, should contribute to the cause and not have a "free ride". Thus, Railway Employees Department v. Hanson, *supra*, decided that it was permissible for the legislature to require all who gain from collective bargaining to contribute to it. AFTRA has been explicitly and particularly selected by a majority of the employees in the same bargaining unit as plaintiff as their bargaining agent. Its services, consequently, are expressly solicited and wanted by these employees for the full, fair and faithful pursuit of the collective bargaining objects and purposes of these employees in the exercise of the rights guaranteed to all employees under the NLRA. Although the plaintiff derides the benefits accruing to him

by reason of the collective bargaining of AFTRA, whether he wants such benefits or not, AFTRA is obligated to provide such benefits to him as an employee in the bargaining unit under the doctrine of Vaca v. Sipes, 386 U.S. 171, 177 (1967):

> "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination towards any, * * *."

The decision of National Labor Relations Board v. General Motors Corp., 373 U.S. 734, makes clear that "membership" need be no more than paying dues.

> "If an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of 'membership' for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a formal member. Of course, if the union chooses to extend membership even though the employee will meet only the minimum financial burden, and refuses to support or 'join' the union in any other affirmative way, the employee may have to become a 'member' under a union shop contract in a sense that the union may be able to place him on the rolls."

The right of access to radio and T.V. is not an absolute right open to all. It is secured to plaintiff by his employer as an incident to his employment. Plaintiff seems to be arguing that in requiring him to be a member of AFTRA

and pay dues, he is being denied free speech because if he fails to remain a member he will not have access to the radio network on which he gives his views. It may be true that by failing to pay dues plaintiff would not be allowed access to the radio programs he now has, but he would also be denied access if his program was cancelled by the network or if his program was preempted by what the network considered a more important show. There are many impediments to having access to air one's view on the radio and T.V. networks. If there were no impediments, such access would be an absolute right that all persons would have.

Thus, it is clear that the "union shop" requirement does not violate the constitutional rights of plaintiff.

The second question to be answered is whether the allegations of coercion and intimidation affect the legal issue discussed above.

Basically, the allegations contend that plaintiff was coerced and intimidated by being told and having knowledge that if he left or was forced out of the union he would not be able to continue broadcasting. However, the court has already made clear that denying the right to broadcast because he is not a member of the union, in the sense that he does not pay dues, is not a violation of his rights. Thus, even if the allegations were true and plaintiff was told that he could not broadcast if he did not remain a "member" of the union ("member" being interpreted by the *General Motors* case as paying dues), this was not coercion or intimidation. As long as plaintiff pays his dues employment cannot be impaired. *Labor Board* v. *General Motors*, supra. This is clear and there is no allegation of facts that in any way shows a violation of the above principle. There has

also been no allegation of union disciplinary action which has interfered with plaintiff's employment. Thus, the factual dispute between the parties does not bear on the legal issue involved and does not prevent the granting of summary judgment. There are not triable issues involved. The union shop agreement does not, as a matter of law, violate any of the plaintiff's constitutional rights.

Accordingly, summary judgment is granted in favor of defendant.

Settle order.

Dated: July 13th, 1972.

P. A. Q.
J. S. C.